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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EVAN EBAUGH,

Petitioner,

v.

CESSNA AIRCRAFT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60 pp

QUESTION PRESENTED

Whether, in a diversity case, the issue of the form that a settlement with one defendant must take in order to preserve claims against a joint tortfeasor is governed by federal or state law.

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EVAN EBAUGH,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Evan Ebaugh petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of his claim for personal injuries allegedly caused by the Cessna Aircraft Company.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 830 F.2d 535 and reprinted in Appendix A. The ruling of

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[1] Petitioner and respondent were the only parties to this case in the courts below. Petitioner had previously sued, in a separate action, respondent, Augusta Aviation Corp., Teledyne Continental Motors, and Anne Horton Adams. The present case was consolidated in the Fourth Circuit with the case of *Auer v. Kawasaki Motors Corp.* and the parties in that case were William Douglas Auer, Kawasaki Motors Corp., U.S.A., and Kawasaki Heavy Industries, Ltd., of Japan.

the district court is unreported and reprinted in Appendices B and C.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant section of the Virginia Code in effect at the time of the accident in this case, and prior to subsequent amendments, reads as follows:

> A. When a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> 1. It shall not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater, and
>
> 2. It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Va. Code § 8.01-35.1(A) (Cum. Supp. 1979).

STATEMENT

This case involves a state-law tort claim that was removed by respondent Cessna Aircraft Company ("Cessna") from a Virginia state court to federal court on grounds of diversity of citizenship. The sole question presented is whether the United States Court of Appeals for the Fourth Circuit was correct in applying state rather than federal law in ruling that petitioner's prior

settlement with another defendant, in a previous diversity action, required dismissal of all claims against respondent. The case merits review because the Fourth Circuit's analysis conflicts with the governing principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, and thereby threatens paramount federal interests in the administration of the federal courts.

This litigation began when petitioner and two co-plaintiffs sued respondent Cessna and three other defendants in federal court seeking compensation under Virginia law for injuries they incurred in an airplane crash on July 25, 1979. One defendant settled in return for a covenant not to sue. Another, Teledyne Continental Motors, paid the plaintiffs $2,000 in return for their agreement to a stipulated dismissal with prejudice, which the court entered on August 2, 1984. The claims against respondent and the fourth defendant were then dismissed without prejudice. Thereafter, petitioner filed suit solely against respondent in state court. Respondent successfully petitioned for removal of the case to federal court on grounds of diversity of citizenship.[2]

Once the case was back in federal court, respondent moved for summary judgment on the ground that petitioner's settlement with Teledyne had not been framed in terms of a "covenant not to sue" and thus, under Virginia law, its effect was governed by the common-law rule that release of one tortfeasor releases all.[3] Peti-

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[2] The case was initially removed to the U.S. District Court for the Eastern District of Virginia. Respondent then successfully sought a transfer to the U.S. District Court for the Western District of Virginia (Harrisonburg Division).

[3] Pet. App. 17a-24a. Under the common law in Virginia, all settlements with tortfeasors had the effect of releasing other joint tortfeasors. *See Wright v. Orlowski*, 218 Va. 115, 235 S.E.2d 349 (1977). Under a Virginia statute that took effect prior to the airplane crash in this case, the common-law rule was amended to

tioner responded that the order dismissing Teledyne in the prior case should be treated as a covenant not to sue rather than a release and that respondent's motion should therefore be denied.[4] The district court held that the dismissal order constituted a release rather than a covenant not to sue. Pet. App. 33a. It further held that the rule applicable to such a release was the original common-law rule, even though the Virginia General Assembly had by 1982 sought to overturn that rule with respect to all settlements executed after July 1, 1980, regardless of the particular terminology used.[5] In so holding, it cited the ruling of the Virginia Supreme Court in *Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 106 S. Ct. 352 (1985), which refused to apply the new statute in cases where the accident occurred before the statutory change.[6]

On appeal to the U.S. Court of Appeals for the Fourth Circuit, petitioner argued that the *Dillon* decision was inapplicable to the present facts[7] and also renewed his

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provide that settlements framed as "covenants not to sue" rather than releases did not exonerate joint tortfeasors. *See* Va. Code § 8.01-35.1 (version effective July 1, 1979).

[4] Pet. App. 24a-28a. *See* note 3 *supra*.

[5] Section 8.01-35.1 had been amended, effective July 1, 1980, to provide that a *release* of one tortfeasor also would not release joint tortfeasors. It was further amended effective April 1, 1982 to make it clear that the new rules would apply to "all such covenants not to sue executed on or after July 1, 1979 and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued." Va. Code § 8.01-35.1(D).

[6] Pet. App. 33a. In *Dillon*, the Virginia Supreme Court held that a tortfeasor's right to a full release in the event that a joint tortfeasor was released constituted a "substantive right" that existed from the moment that the cause of action accrued and that the new statute could only constitutionally apply to torts committed after its effective date. 329 S.E.2d at 44-45.

[7] He noted that the constitutional holding in *Dillon* was premised on the fact that pre-1979 Virginia tortfeasors had a right to con-

argument that there was no "release" here. After argument to a panel, the Fourth Circuit *sua sponte* ordered the case consolidated with a Maryland case raising similar issues and set both cases for argument *en banc*.[8] The court also notified counsel to be prepared to discuss whether the effect of settlements with some but not all defendants is an issue governed by federal rather than state law in federal court, and invited supplemental briefing on this issue.[9]

In a supplemental brief, petitioner argued that the issue was a matter of federal law in a diversity case. He pointed to a prior ruling of the Fourth Circuit that seemed dispositive,[10] and argued that, under the governing *Erie* rulings of this Court, the federal interests in controlling administration of the federal courts and promoting resolution of cases far outweigh any state interests in the application of state law on this issue in federal diversity cases. Respondent argued that the district court was correct in applying state law.

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tribution from joint tortfeasors that could not be cut off by the unilateral agreement of the plaintiff and that joint tortfeasor. Here, by contrast, since the accident happened after July 1, 1979, it was clear that the plaintiff and a joint tortfeasor could defeat this right to contribution through the simple device of a covenant not to sue. *See* note 3 *supra*. Thus, by that time, Virginia tortfeasors could not claim a constitutionally significant interest in the retention of what still remained of the old common-law rule—*i.e.*, the principle that a settlement phrased as a "release" of one tortfeasor releases all.

[8] Pet. App. E (consolidating case with the pending appeal in *Auer v. Kawasaki Motors Corp.*)

[9] Pet. App. F.

[10] *See Gamewell v. HVAC Supply Co.*, 715 F.2d 112, 115 (4th Cir. 1983) ("Once a claim—whatever its jurisdictional basis—is initiated in the federal courts, we believe that the standards by which that litigation may be settled, and hence resolved short of adjudication on the merits, are preeminently a matter for resolution by federal common law principles, independently derived.")

The Fourth Circuit affirmed. The majority stated that, in diversity cases, state rules governing the effect of settlements with co-defendants directly "implicate" state laws governing the "rights of contribution among joint tortfeasors" and "immunity from further prosecution of the civil claim." Based solely on this assertion, the court held that the state rule "must control the result in the absence of federal preemption." [11] It distinguished the court's previous ruling that in federal court the *validity* of a settlement agreement is an issue of federal law.[12]

Judge Hall dissented. He noted that, unlike in the consolidated case,[13] the release at issue here was given in a federal court action, and that the majority had conceded a federal court's "legitimate interest in controlling its docket and insuring fair dealing among the parties and between the parties and the court." [14] He added that "the majority now asks us to adopt the position that, while the validity of a release executed in federal court should be determined under federal law, the effect of that very same release upon *third parties* is to be determined by state law." [15] In his view, "neither *Erie R.R.* nor common sense commands such an interpretation." [16]

REASONS FOR GRANTING THE WRIT

The ruling of the Fourth Circuit in this case merits review because its analysis diverges substantially from

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[11] Pet. App. 7a.

[12] Pet. App. 6a-7a (discussing *Gamewell Manuf., Inc. v. HVAC Supply Co.*, 715 F.2d 112 (4th Cir. 1983)).

[13] Judge Hall agreed that in the *Auer* case, the effect of a release given in a *state* court should be determined by state law in a separate diversity action against other defendants. Pet. App. 13a.

[14] Pet. App. 13a.

[15] *Ibid.* (emphasis in original).

[16] *Ibid.*

the approach to *Erie* problems mandated by this Court in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1965). Indeed, the Court of Appeals did not make a serious attempt to apply the principles set out in those cases. Instead, it reached its conclusion based merely on the fact that the question involved—the effect of a settlement with one defendant on claims against another—potentially affects the enforcement of a state-law right. Such a simplistic approach begs the key question, which is whether affected state interests outweigh relevant federal concerns. The decision to adopt such an approach by the *en banc* Fourth Circuit creates a serious potential for misapplication of the *Erie* doctrine in a whole range of contexts, and thus should be corrected. At minimum, this case should be held pending this Court's rulings in two other *Erie* cases being argued this Term, which may well indicate that a revised analysis is required here.

I. The Fourth Circuit Misapplied Governing Precedents of This Court.

In *Byrd* and *Hanna*, this Court held that choice of federal or state law in a diversity action cannot be based solely on whether the choice will affect the outcome of the case after the fact. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. at 537; *Hanna v. Plumer*, 380 U.S. at 469. Instead, in those cases, the Court set out principles that allow for an appropriate balancing of federal and state interests. While the approaches mandated in the two cases differ somewhat, under either methodology the legal issue here—the effect of a settlement with one tortfeasor on the plaintiff's claim against another tortfeasor—should be governed by federal law in a federal court.

A. *The Byrd Approach*

The *Byrd* analysis proceeds in two steps.[17] First, the court must determine whether the state rule at issue is "bound up" with the underlying state-law cause of action "in such a way that its application in the federal court is required." 356 U.S. at 535. If so, then state law must be applied. If not, then the rule constitutes a rule of "form and mode" and, if it is likely to have an effect on the outcome, the court must proceed to balance the state interest in uniform outcomes against any federal interest that may exist in following different procedures in federal court. *Id.* at 536-39.

Applying this analysis, the Court in *Byrd* first held that the rule at issue—*i.e.*, whether a judge or a jury should determine the plaintiff's status as an "employee" of the defendant barred from proceeding outside the state workers compensation scheme—was not an "integral part" of the state compensation system but a separate, essentially procedural rule. *Id.* at 535-36. It then held that the federal interest in allocating the functions of the judge and jury in federal court outweighed the state's interest in avoiding the somewhat speculative possibility of differential outcomes caused by application of the federal rule. *Id.* at 536-40.

Under this analysis, the present case should be treated in precisely the same way. First, it cannot be said that the state rule here is in any way "bound up" with the state tort claims filed against respondent. The requirement at issue—that a settlement with one defendant be phrased as a covenant not to sue rather than a release in order to preserve claims against other defendants—is purely a technical matter of pleading.[18] It does not in any way af-

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[17] *See* 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4504, at 29.

[18] As the district court in this case explained, a covenant not to sue, unlike a release, does not as a technical matter terminate the

fect the ability of a plaintiff to settle with one tortfeasor while proceeding against another, as long as the proper form is used. Thus, contrary to the Fourth Circuit's suggestion that the issue here "implicates" or "involves" state substantive law governing the liability of joint tortfeasors,[19] the state rule cannot be considered an "integral part" of any scheme for deterring tortious conduct or compensating injured victims.[20]

It follows that the choice of law here should depend on a balancing of federal interests against any state interest

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underlying cause of action. It simply prevents its further pursuit. Pet. App. 32a. The court did not, however, identify any policy reason why Virginia chose to treat settlements differently based on this distinction. Instead, it seems clear that the Virginia legislature, in its initial modification of the common-law rule, *see* note 3 *supra*, was simply following the approach that many courts had adopted around the country in an effort to avoid the inefficiency and potential injustice of the common-law treatment of releases of joint tortfeasors. *See Prosser and Keeton on the Law of Torts* 334 (5th ed. 1984).

[19] Pet. App. 7a. This suggestion may reflect the fact that the Supreme Court of Virginia held in *Potomac Hosp. Corp. v. Dillon*, *supra*, that the right of a tortfeasor to be released when his fellow alleged tortfeasors are released constitutes a "substantive right" not subject to retroactive revision by the legislature. But this analysis, even if valid, does not apply to a case, like the present one, where the accident occurred after the legislature had authorized partial settlements framed as covenants not to sue. At that point, the issue was solely one of form, not substance.

[20] Indeed, even if Virginia had not by 1979 partially revised the common-law rule to allow for partial settlements in the form of covenants not to sue, the question of the effect of a settlement still could not be seen as part and parcel of the underlying cause of action. No one, in embarking on a tortious course of conduct, is likely to consider the question whether his victim will be able to settle independently with some tortfeasors and retain his claim against others. And even if he did consider this question, he would have no way to know whether he might later prefer the freedom to settle individually over a rule mandating a united front among all alleged tortfeasors.

in not having federal courts follow a different rule from that prevailing in state court. *Byrd, supra.* The federal interests implicated by the release rule are clear. In federal litigation, this Court has "expressly repudiated" the old common-law rule that a settlement with one tort defendant will release all others. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 344 (1971); *see Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 501 (1964). It has done so in large part because the common-law rule interferes with the resolution of matters pending in federal court. *See Zenith Radio, supra,* 401 U.S. at 347 ("To adopt the ancient common-law rule would frustrate . . . partial settlements, and thereby promote litigation . . . .") [21] Just as importantly for present purposes, the Court in *Zenith Radio* also repudiated an alternative rule that, like Virginia rule in this instance, made the outcome dependent on the technical language of the prior settlement.[22] It concluded that such a rule would simply "create a trap for unwary plaintiffs' attorneys." 401 U.S. at 347.

The twin underpinnings this Court's ruling in *Zenith Radio*—the desire to have a rule that neither deters settlements nor lays a trap through technical pleading requirements—are no less applicable where, as here, the

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[21] *See also McKenna v. Austin*, 134 F.2d 659, 662 (D.C. Cir. 1943) ("Compromise is stifled, first, by inviting all to wait for the others to settle and, second, because claimants cannot accept less than full indemnity from one when doing that discharges all.") An additional concern is basic fairness. Under the common-law rule, "[w]rongdoers who do not make or share in making reparation are discharged, while one willing to right the wrong and no more guilty bears the whole loss." *Ibid.* Thus, the "rule short-changes the claimant or overcharges the person who settles . . . ." *Ibid. See also Prosser and Keeton on the Law of Torts* 333 (5th ed. 1984).

[22] The proposed alternative was a rule requiring settling plaintiffs to "expressly reserve" their rights against other defendants. 401 U.S. at 344.

case is brought to federal court in diversity. In such a case, first of all, the federal policy favoring expeditious settlements, reflected in the Federal Rules of Civil Procedure themselves,[23] remains just as important. Indeed, it is in complex, multi-defendant tort matters that come into federal court through diversity jurisdiction that the availability of partial settlements is especially vital.[24] Moreover, in a diversity case as in any other, a federal court has a strong interest in promoting justice by determining the effect of a settlement through reference to the actual intent of the settling parties, rather than through formalistic and tricky pleading requirements like the rule requiring a "covenant" rather than a "release." [25]

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[23] Rule 16 specifically encourages federal judges to promote settlements while Rule 68 imposes sanctions for failure to accept a settlement offer that is more generous than the ultimate verdict.

[24] For example, in one ruling, the U.S. District Court for the Eastern District of Virginia stated that "the practical effect" of requiring adherence to Virginia law on this issue would be "disastrous, not only for plaintiffs, but for this Court." *Mann v. H.K. Porter Co.*, Civ. Action No. 83-477-N, Memorandum Decision at 13 (E.D. Va. July 8, 1985). It noted that there were then pending in the district several hundred asbestos-exposure cases in which the plaintiffs had settled with some of the defendants and faced dismissal of their claims based on the state rule. *Id.* at 13-14. One possible consequence of the Fourth Circuit's decision in the present case would be an effort to rescind these prior settlements as based on mistakes of law. The alternative would be to accept the "obvious inequity of requiring dismissal of all current cases in which a plaintiff had settled with at least one defendant, despite such result being exactly contrary to all parties' intentions," and despite that fact that the setlements had been "specifically encouraged by this Court." *Ibid.*

[25] As this D.C. Circuit has put it:

> In determining the character as well as the effect of [a settlement], we are unwilling to concede so much potency to mere verbalism. The matter does not require the formalism of conveyancing. Whether words of "release" or of "covenant" are used, the effect should be the same.

McKenna v. Austin, supra, 134 F.2d at 662.

On the state side of the ledger, by contrast, little or nothing is at stake here. The key question is whether following the federal rule in diversity cases would create a high likelihood of outcomes different from those that would have occurred in state court. *Byrd, supra,* 356 U.S. at 536-37. Here, no such likelihood exists. Even assuming that the relevant choice were between the old common-law rule barring partial settlements and the federal rule allowing them, the fact is that this choice would have a far greater impact on the *pace* of the litigation than on its *outcome.* Where partial settlements are allowed, some defendants may settle while others go to trial. Under the common-law rule, there will likely be either a global settlement or a trial involving all defendants. It is impossible to say, however, that either rule will expand or contract the judgments ultimately paid. Indeed, the outcome may be precisely the same in a given case under either rule.

In reality, moreover, the choice here is even less significant, from the point of view of the State. Under either state or federal law, in this case partial settlements would be allowed. The sole issue is whether they (1) must be framed in terms of a "covenant not to sue" or (2) can be framed as a "release." If the applicable rule is clear, and counsel are aware of it, then there will literally be no differential outcomes in state and federal courts if those tribunals take conflicting positions on this pleading requirement.[26] In sum, this is not the sort of question that, under the *Byrd* analysis, ought to be controlled by state law. It is exactly comparable to the issue in *Byrd* itself—the selection of the proper fact-finder—which was resolved on the basis of federal law.

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[26] As noted above, the Virginia General Assembly further evinced a lack of interest in this pleading requirement by repealing it to the full extent authorized under the state constitution. *See* notes 5 & 6 *supra.*

B. *The* Hanna v. Plumer *Approach*

Although the balancing test set out in *Hanna v. Plumer*, *supra*, is somewhat different, the outcome remains the same under that approach. There, the Court stated that the determinative question is whether application of a particular federal rule in diversity cases would create differences between state and federal litigation of the same types of claims that are sufficiently significant to cause "forum shopping" or "inequitable administration of the laws." 380 U.S. at 468.[27] The Court held that, under these standards, service of process under federal procedures should have been allowed in a diversity case.[28] It reasoned that allowing use of the federal service method, although highly "outcome-determinative" in that case after the fact, would only require a minor divergence between the procedures in federal and state cases in the future. This divergence would neither affect the choice of a forum nor create issues of inequitable treatment of parties proceeding on the same types of claims in federal and state courts. *Id.* at 468-69.

Here, precisely the same reasoning applies. Neither plaintiffs nor defendants are likely to choose a forum on the basis of whether it requires partial settlements to be phrased as "covenants not to sue" or allows them to be general releases. Nor is there any potential for "inequitable administration of the laws" merely because the federal and state courts have different rules of phraseology in this area. Indeed, even if the issue here were the availability in federal court of partial settlements *vel non*, the indeterminacy of the effect of this choice at the outset of

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[27] *See* 19 C. Wright, A. Miller & E. Cooper, *supra*, § 4504, at 38-39.

[28] The Court went on to rely on the fact that requiring service under state procedures would conflict with valid provisions of the Federal Rules of Civil Procedure. 380 U.S. at 469-74. The factors discussed here, however, were set out before the Court reached this additional issue.

litigation suggests that there would be no reason to mandate adherence to state law. In sum, the Fourth Circuit's ruling is no more defensible under *Hanna* than under the somewhat different principles enunciated in *Byrd*.[29]

II. This Case Should at Minimum Be Held Pending Resolution of Two Other Cases to Be Argued This Term.

On October 13, 1987, this Court granted writs of certiorari in two other cases from other circuits raising *Erie* questions that are similar to those raised here—*Stewart Organization, Inc. v. Ricoh Corp.*, No. 86-1908, and *Budinich v. Becton Dickinson and Co.*, No. 87-283. Because of the problems with the Fourth Circuit's approach discussed above, and because the Court's rulings in these two cases are likely to provide clearer guidance on the appropriate accommodation of state and federal interests in this area, we would ask that the Court at minimum hold this petition pending those rulings.

The issue in *Stewart Organization* is whether a contractual choice-of-forum clause, which would not be enforceable in Alabama state court, should be enforced under federal law when a lawsuit is filed in federal court in Alabama. The *en banc* Eleventh Circuit held that the issue was properly decided under federal law, and ordered the case transferred to New York on that basis. 810 F.2d 1066 (1987). In *Budinich*, the issue is the timeliness of an appeal from a state-law judgment. The appellant had held his appeal until after the district court had resolved the issue of attorneys' fees available under state law. The Tenth Circuit held that, although under state law the merits judgment was not final until the fee ruling, the

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[29] As Judge Hall pointed out in his dissent below, the Fourth Circuit's ruling is especially anomalous because that court acknowledged that determinations of the *validity* of settlements should be made on the basis of federal law. *See* Pet. App. 13a. We can see no distinction that would justify applying federal law to that question, while determining the effect of the settlement on another defendant on the basis of state law.

timing of an appeal in federal court is a procedural matter governed by federal law. It then concluded that the appeal of the merits judgment was untimely because the pendency of the fee issue did not undermine the finality of that earlier judgment. 807 F.2d 155 (1986).

In both of these cases, the rules at issue are in some sense procedural, but the application of federal law has had an impact on the course of the litigation. In each instance, the issue will be whether the differential treatment occasioned by the fact that the case was filed in federal rather than state court is of the type that *Erie* condemns. The same question is presented here. Especially in view of the compelling reasons for believing that the Fourth Circuit's resolution of the issue in the present case was erroneous, it would seem appropriate, at minimum, to hold the present petition and determine later whether a remand to the Fourth Circuit for reconsideration is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1591

WILLIAM DOUGLAS AUER,
Appellant,

versus

KAWASAKI MOTORS CORP., U.S.A.,
Appellee.

and

KAWASAKI HEAVY INDUSTRIES, LTD., A BODY CORPORATE OF KOBE, JAPAN,
Defendant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Herbert F. Murray, District Judge—(C/A HM-82-777)

No. 85-2331

EVAN EBAUGH,
Appellant,

versus

CESSNA AIRCRAFT COMPANY,
Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Harrisonburg
James H. Michael, Jr., District Judge—(C/A 84-0148)

Argued: December 8, 1986 Decided: October 6, 1987

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, and HAYNSWORTH, Senor Circuit Judge, sitting en banc.

No. 85-1591(L), 85-2331. Lois Rudo Karp; Joel I. Klein (Christopher D. Cerf; Onek, Klein & Farr); Robert T. Hall; Douglas K. W. Landau; Hall, Surovell, Jackson & Colten, P.C.; Eugene I. Glazer on brief for appellants; Carl F. Ameringer; Thomas L. Appler (John E. McIntosh, Jr.; Boothe, Prichard & Dudley; Michael Esher Yaggy; Michael S. Barranco on brief) for appellees.

HAYNSWORTH, Senior Circuit Judge:

These two cases were heard by individual panels of the court, but before a decision in either case, the judges of the court in regular active service voted unanimously to rehear the cases *en banc*.

These personal injury actions in the diversity jurisdiction present a common question of the applicable law, state or federal, in determining the effect of a release of one joint tortfeasor upon the state created rights and liabilities of other alleged joint tortfeasors, defendants in pending federal actions. More specifically, we are called upon to determine the reach of *Gamewell Manufacturing, Inc. v. HVAC Supply Co., Inc.*, 715 F.2d 112 (4th Cir. 1983), in which it was held that the validity of a release of a federal claim, the subject of a pending federal court action, was to be determined under federal rather than state law. Since the question in these cases is the effect of releases, concededly valid as between the parties, upon the rights and liabilities of alleged joint tortfeasors, rights and liabilities derived from state law, the effect of the releases upon those third parties is to be determined under state law.

Applying the appropriate state law, we conclude in each case that the release of one joint tortfeasor effectively released the other alleged joint tortfeasors. Hence, we affirm the grant of summary judgment for the defendant in each case.

A. *Auer v. Kawasaki*

While riding his Kawasaki motorcycle, William Auer collided with a garbage truck owned by Browning-Ferris Industries and suffered personal injury. He brought suit in a Maryland state court against Kawasaki USA, the American distributor, alleging product liability claims. Kawasaki removed the action to the federal district court, and filed an answer. Auer also brought suit in a Maryland state court against BFI and Schirmacher, the driver of the garbage truck, alleging negligence in the truck's operation.

Auer and BFI reached a settlement agreement. With the advice of counsel, Auer signed and delivered a document entitled "Release of All Claims," which provided that,

> FOR AND IN CONSIDERATION of . . . [$5,000] . . . I . . . foreover discharge [BFI and Schirmacher] and all other persons, firms and corporations who might be liable of and from any and all actions . . . on account of, or in any way growing out of . . . [the] accident that occurred [between Auer and the garbage truck] . . . .
>
> . . . .
>
> This release contains the ENTIRE AGREEMENT between the parties . . . .

Kawasaki's lawyer received a copy of the release. Kawasaki's answer was amended to include the defense of release, and a motion for summary judgment on that defense was filed. The lawyers for Auer and BFI then executed an amended release with an explanatory pre-

amble in which they undertook to rescind the earlier release. They stated in the preamble that the original release was "not in any way intended to confer any benefit on the distributor and/or manufacturer of the vehicle operated by . . . Auer." The recital continued that, because the "previously executed release could be misconstrued to confer an unanticipated benefit" on Kawasaki, "counsel [for both parties] . . . hereby agree to rescind the prior release and declare same to be null and void."

In granting summary judgment, the district court held that, under Maryland law, the first release discharged Kawasaki and the attempted rescission was not an effective revocation of that discharge.

B. *Ebaugh v. Cessna*

Evan Ebaugh was one of three passengers on a Cessna 172H Skyhawk which took off from the Waynesboro, Virginia airport on July 25, 1979. Some thirty minutes later the plane crashed in the foothills of the Blue Ridge Mountains of Virginia. The cause of the crash has not been determined.

Ebaugh and the other passengers filed suit in the United States District Court for the Western District of Virginia, seeking recovery for their personal injuries. They named as defendants Cessna, manufacturer of the airplane, Augusta Aviation Corporation, owner of the plane, Teledyne Continental Motors, manufacturer of the plane's engine, and Anne Adams, the plane's senior pilot. August Aviation settled the claim against it, and paid $40,000 in return for a covenant not to sue. Later, after the filing of a FAA report which stated that no defect in or malfunction of the engine had been found, the plaintiffs agreed to settle with Teledyne Continental for $2,000. The plaintiffs and Teledyne filed a joint motion for dismissal of the claims against Teledyne with prejudice. That motion was granted.

Still later, in order to avoid dismissal under Federal Rule 37(b) for non-compliance with discovery orders, Ebaugh took a voluntary dismissal without prejudice of his action against Cessna pursuant to Rule 41(a)(2). He then filed a new action against Cessna in the Circuit Court for the City of Richmond. That action was removed to the United States District Court for the Eastern District of Virginia and then transferred to the Western District of Virginia.

Summary judgment was then granted Cessna upon the ground that, under Virginia law, dismissal of the claim against Teledyne Continental with prejudice constituted a release, which extinguished Ebaugh's claim against Cessna.

II.

No one doubts that a federal court called upon to adjudicate a state law claim in the diversity jurisdiction must apply the relevant state law in determining the substantive rights and duties of the parties, while applying federal law to matters of procedure. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). The line between the two is not always bright, however. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1957); *Wratchford v. S. J. Groves & Sons Co.*, 405 F.2d 1061 (4th Cir. 1969).

In *Gamewell*, the question was the validity of the settlement agreement of a federal claim pending in a federal court. The plaintiff, Gamewell Manufacturing, had sued HVAC Supply for patent infringement. Because of a mixup of samples, Gamewell received a laboratory report indicating that its patented process was not superior to earlier art. It accepted the defendant's settlement offer. It then learned of the mixup of samples and obtained a new laboratory report indicating that the results of the patented process were substantially superior to results obtainable under the prior art. The district

court declined to recognize Gamewell's attempted rescission of the settlement agreement because North Carolina law did not permit rescission of a contractual agreement on the basis of a unilateral mistake. On appeal, this court held that the validity of the agreement was to be determined under federal law, and remanded the case for redetermination.

The claim in *Gamewell* was one of patent infringement, a claim springing solely from federal law. *See Aro Manufacturing Co. v. Convertible Replacement Top Co.*, 377 U.S. 476 (1964). Such a claim is far removed from state law and substantive rights that are the creatures of state law. *See id.* at 501; *see also Graham v. John Deere Co.*, 383 U.S. 1, 5-10 (1966).

The majority in *Gamewell* went further, however. It held that even when the substantive rights of the parties are derived from state law, there is still a distinct federal interest in the procedural aspects of settling or releasing claims pending in a federal court. The court said:

> Once a claim—whatever its jurisdictional basis—is initiated in the federal courts, we believe that the standards by which that litigation may be settled, and hence resolved short of adjudication on the merits, are preeminently a matter for resolution by federal common law principles, independently derived.

Gamewell, 715 F.2d at 115 (citation and footnote omitted).

With respect to pending federal litigation, the federal court has a legitimate interest in controlling its docket and insuring fair dealing among the parties and between the parties and the court. *See White Farm Equipment Co. v. Kupcho*, 792 F.2d 526, 529 (5th Cir. 1986); *see also Atkins v. Schmutz Manufacturing Co.*, 435 F.2d 527, 536 (4th Cir. 1970), *cert. denied*, 402 U.S. 932

(1971). Those interests are distinctly procedural in nature, and the *Gamewell* court found them predominant when the question was the validity of the settlement agreement as between the settling parties themselves. The focus must change dramatically, however, when the question is the effect of a release upon the rights and duties of third parties. When those substantive rights and duties are derived from state law, the effect upon them by another party's settlement must be determined under state law. *E.g., Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 487 (6th Cir. 1973); *see also Fairfax Countywide Citizens Association v. County of Fairfax*, 571 F.2d 1299, 1303 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978).

In these two cases the question is the effect of a release by the plaintiff of one of the joint tortfeasors but not the others. The substantive rights of the parties here are governed by state law. In states recognizing rights of contribution among joint tortfeasors, those rights are implicated. State law immunity from further prosecution of the civil claim is directly involved, and state law must control the result in the absence of federal preemption. *See Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 139-40 (3d Cir. 1979); *see also Tiesler v. Martin Paint Stores, Inc.*, 76 F.R.D. 640, 643 (E.D. Pa. 1977); *Brooks v. Brown*, 307 F. Supp. 907, 909-10 (E.D. Va. 1969).

The *Gamewell* opinion should be read in light of the procedural question presented. It cannot be read to mean that the effect of a release of a state law claim upon third parties having rights and duties defined by state law is to be determined as a matter of federal procedure. We conclude that the district court in each of these cases properly applied state law in determining the effect of the release.

III.

A. *Auer v. Kawasaki*

The original release was a completely integrated document that, by its terms, operated in favor of "all . . . corporations who might be liable" to compensate Auer for his injuries. Unequivocally, it discharged Kawasaki. Under applicable Maryland law at the time, such a release discharged joint tortfeasors not specifically mentioned in the release but generally described in it. It is of no moment that the unnamed beneficiary of the release gave no consideration for it, was being sued separately, or was confronted with a different theory of liability. *See Pemrock, Inc. v. Essco Co.*, 249 A.2d 711, 714-15 (Md. 1969); *see also Peters v. Butler*, 251 A.2d 600, 602 (Md. 1969); *White v. General Motors Corp.*, 541 F. Supp. 190, 191-94 (D.Md. 1982); *Stefan v. Chrysler Corp.*, 472 F. Supp. 262, 263-64 (D.Md. 1979), *aff'd*, 622 F.2d 587 (4th Cir. 1980) (table). The rule was changed by statute effective July 1, 1986. *See* Md. Ann. Code art. 79, § 13 (Michie Supp. 1986). Earlier, however, in the absence of fraud, duress or mutual mistake, parol evidence was inadmissible to alter or explain the terms of such a release. *See Pemrock*, 249 A.2d at 715-16; *see also White*, 541 F. Supp. at 191.

Maryland's strict enforcement of general releases was based in substantial part on the state's adoption of the Uniform Contribution Among Tort-feasors Act. Md. Ann. Code art. 50 §§ 16-24 (1986). An unequivocal, unconditional release such as this "by an injured party of one joint tort-feasor does not relieve him from liability to make contribution to another joint tort-feasor." *Id.* § 20. As the court observed in *Stefan*, "[t]he defendant who originally procures the release gains nothing if the plaintiff can sue other joint or concurrent tortfeasors . . . . [because] the original defendant is left open to claims for contribution and/or indemnity and winds up having to

litigate the case anyway." *Stefan*, 472 F. Supp. at 264 n.1 (citation omitted).

The evidence of the attempted rescission of the release is strongly indicative of the original intention of Auer and BFI, but under applicable Maryland law at the time, that evidence must be ignored.

While a releasee may consent to the recreation of a cause of action against it, two parties to a release may not recreate a discharged cause of action against a third party without the third party's consent. *Cf. Swigert v. Welk*, 133 A.2d 428, 429-30 (Md. 1957).

Auer fares no better under his third party beneficiary analysis. Under the unequivocal language of the original release, Kawasaki can only be considered an "intended beneficiary." *See White*, 541 F. Supp. at 194. The power to modify the benefit accruing to such a beneficiary terminates when the beneficiary "brings suit on" the promise. Restatement (Second) of Contracts § 311(3) (1981). Kawasaki's amendment of its answer to set up the release defense and its motion for summary judgment on that defense act as an equivalent bar to modification.

We can discern no mutual mistake of fact infecting the execution of the original release which would make it voidable. Neither can we subscribe to Auer's interpretation of that document which would place Kawasaki in breach if it sought to interpose the release as a bar to Auer's suit. The release provision prohibiting the pleading of the release as a bar to suit pertains only to the signer of the release, Auer. Any other construction would render the release meaningless.

Under applicable Maryland law at the time, the general release effectively discharged Kawasaki.

B. *Ebaugh v. Cessna*

Ebaugh's case is governed by Virginia law.

For many years, Virginia followed the strict common law rule that the release of one joint tortfeasor operated

as a release of all. *See Wright v. Orlowski*, 235 S.E.2d 349, 352 (Va. 1977). In 1979, the Virginia General Assembly enacted § 8.01-35.1 to provide that a covenant not to sue given in good faith to one joint tortfeasor would not discharge other joint tortfeasors unless there was specific provision for it. That statute was amended in 1980 to provide for a similar narrowing of a release given in good faith. That statute was amended yet again in 1982 to give it retroactive effect so as to apply to all covenants not to sue executed on or after July 1, 1979 and to all releases executed on or after July 1, 1980, regardless of the time of accrual of the affected cause of action. *See* Va. Code § 8.01-35.1(D) (Michie Supp. 1987).

The settlement between Ebaugh and Teledyne was reached in 1984, so that under the literal terms of the statute, release of Teledyne would not operate to the benefit of Cessna. Virginia courts have held, however, that the statute, under Virginia's Constitution, may not be given such a literal, retroactive effect to apply to rights accrued before the statutory change.

In Virginia, a joint tortfeasor's right to contribution is a substantive right which, although inchoate, arises at the time of the tortious injury. *Potomac Hospital Corp. v. Dillon*, 329 S.E.2d 41, 44 (Va.), *cert. denied*, 106 S. Ct. 352 (1985); *Shiflet v. Eller*, 319 S.E.2d 750, 754 (Va. 1984). The substantive right has two components: a right to seek contribution and the right to be released when the injured person releases another joint tortfeasor. *Bartholomew v. Bartholomew*, 353 S.E.2d 752, 755 (Va. 1987). Since, under the Virginia Constitution, the General Assembly is without power to impair such vested rights retroactively, *see e.g., Duffy v. Hartsock*, 46 S.E.2d 570, 574-75 (Va. 1948), we must apply Virginia law as it existed at the time of injury rather than at the time of the release. *See Bartholomew*, 353 S.E.2d at 756; *Shiflet*, 319 S.E.2d at 754-55; *see also Carick-*

hoff v. BadgerNorthland, Inc., 562 F. Supp. 160, 165 (W.D. Va. 1983).

Ebaugh was injured on July 25, 1979. A right of contribution from the other joint tortfeasors accrued to each joint tortfeasor at that time. Section 8.01-35.1 exempted only convenants not to sue and did not prevent application of the common law rule regarding the release of a joint tortfeasor. *Perdue v. Sears, Roebuck & Co.*, 523 F. Supp. 203, 205-06 (W.D. Va. 1981), *aff'd*, 694 F.2d 66 (4th Cir. 1982).

There was no formal release or written memorial of the settlement agreement. It is undisputed, however, that, in return for the payment of $2,000 by Teledyne, the claims against it were consensually dismissed with prejudice. Ebaugh exchanged his cause of action against Teledyne for a sum of money with the effect of extinguishing his claim against Teledyne. Those are the essential characteristics of a release.

A release need not be in writing. It is enough that there has been an accord and satisfaction. As the Virginia Supreme Court has stated:

> The making of an *accord* and the acceptance of *satisfaction* will effect a release. *When a tortfeasee* accepts satisfaction from one tortfeasor *for the part he played* in the joint tort, that tortfeasor is released and his release operates to release all other tortfeasors.

Wright, 235 S.E.2d at 353 (emphasis in original). Since the FAA report tended to exonerate Teledyne, the $2,000 paid by it was not unrepresentative of the part it played in the joint tort.

We find no error in the district court's conclusion that there had been an accord and satisfaction of Ebaugh's claim against Teledyne with the result that other joint tortfeasors were released.

The Virginia rule is based upon the Virginia Constitution. *Farish v. Courion Industries, Inc.*, 754 F.2d 1111, 1115 n.8 (4th Cir. 1985) (*en banc*). It is not impermissible under the Federal Constitution, and the federal courts are bound to follow it in situations in which it is applicable.

IV.

The judgment of the district court in each case is affirmed.

AFFIRMED.

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in that part of the majority's opinion which affirms the district court's grant of summary judgment in favor of defendant Kawasaki and against Auer. I cannot agree with the Court's decision as to *Ebaugh v. Cessna*, however. Therefore, as to that part of the majority's holding, I must respectfully dissent.

In *Auer v. Kawasaki*, the settlement between the parties was achieved in *state* court, and thus, arguably, was beyond the reach of our holding in *Gamewell*. Moreover, all of the parties in that case agreed that state law was controlling. The only issue in *Auer* was whether the broad release executed by Auer released the other defendant, not a party to the agreement. *Ebaugh*, however, involved a release reached in the course of a *federal* proceeding. In *Gamewell*, we held that federal common law, not state law, governs the effect that a settlement with one tortfeasor has on other joint tortfeasors in all federal cases, including diversity actions. The majority now asks us to adopt the position that, while the validity of a release executed in federal court should be determined under federal law, the effect of that very same release upon *third parties* is to be determined under state law. I believe that neither *Erie R.R.* nor common sense commands such an interpretation.

The majority freely admits that, with respect to pending federal litigation, the federal court has a legitimate interest in controlling its docket and insuring fair dealing among the parties and between the parties and the court. Moreover, "[t]he federal system is an *independent* system for administering justice to litigants who properly invoke its jurisdiction." (Emphasis added). *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525, 537 (1958).

The Court, by its holding today, completely ignores the clear intent of the parties involved. Furthermore, under

this decision, a party could reach what it thought was a settlement (and an end to litigation) in federal court and then find itself being forced to litigate the *effect* of that settlement as to a third party in a state court proceeding.

For the foregoing reasons, I would affirm the district court's decision as to *Auer* but would reverse the district court's decision as to *Ebaugh* in accordance with this Court's prior holding in *Gamewell*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 84-0148-H

JUDGE JAMES H. MICHAEL, JR.

EVAN EBAUGH,

Plaintiff

v.

CESSNA AIRCRAFT CO.,

Defendant

[Filed Nov. 21, 1985]

ORDER

For the reasons stated in open court on November 15, 1985, it is this day.

ADJUDGED AND ORDERED

as follows:

1. Defendant's motion for summary judgment shall be, and it hereby is, granted.

2. The above-styled action shall be, and it hereby is, dismissed, with prejudice, and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED:

/s/ [ILLEGIBLE]
Judge

November 21, 1985
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 84-0148-H

EVAN EBAUGH,

Plaintiff,

v.

CESSNA AIRCRAFT CO.,

Defendant.

HEARING ON
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT and MOTION FOR
PROTECTIVE ORDER,
PLAINTIFF'S MOTION TO COMPEL

on

November 15, 1985—12:00 p.m.

at

Charlottesville, Virginia

Before Honorable James H. Michael, Jr., Judge

APPEARANCES:

David J. Fudala, Esquire, Counsel for the Plaintiff; Thomas L. Appler, Esquire, Counsel for the Defendant.

November 15, 1985—12:15 p.m.

THE COURT: All right, Madam Clerk, would you call the case, please?

THE CLERK: Yes, Your Honor. This is Civil Action No. 84-0148-H, *Evan Ebaugh, Plaintiff, versus Cessna Aircraft Company, Defendant.*

THE COURT: Thank you.

All right, gentlemen, the case is before the Court on the defendant's Motion for Summary Judgment, defendant's Motion for Protective Order, and the plaintiff's Motion to Compel. Let's take up the Motion for Summary Judgment first.

Mr. Appler, you have filed that motion. Do you wish to present it?

MR. APPLER: I do, Your Honor. And in addition, if Your Honor please, I would ask the Court to accept at this time an additional motion that pertains to the argument on the Motion for Summary Judgment. As Your Honor is probably aware, an Affidavit was filed in this case, in opposition to the Motion for Summary Judgment, that was executed by the plaintiff's counsel, as opposed to the party, or to a witness. I received that on Monday. I served a copy of the motion, which is a Motion to Strike that Affidavit, yesterday, but could not get it down here to the Court, and because of the subject matter of the motion, frankly, I felt that I wanted the other side to have an opportunity to review it prior to the time that it would be filed with the Court and the Clerk.

I would ask Your Honor to permit the Clerk to accept that at this time.

THE COURT: All right, sir, you may file it. The Court will consider it.

MR. APPLER: Thank you, sir. While we're at it, we have avoided some of the issues on the latter motion that Your Honor heard. I understand we're not at that point yet, but I do have Answers to Interrogatories and I would like to file those at this time. They have been served on the other side.

THE COURT: All right.

MR. APPLER: If your Honor please, I am, obviously, representing the defendant, Cessna Aircraft

Company, in this matter and on its Motion for Summary Judgment, supported by a Memorandum which was filed, in opposition to which was filed a Memorandum of Law by plaintiff this week.

The facts which I take to be admitted from the Answers to Interrogatories, from the response to Requests for Admissions by plaintiff, can be very simply stated. They are that the plaintiff in this case, Mr. Ebaugh, through his attorneys, with proper authority, agreed to settle their claims, that is to say, all three claims, including the Plaintiff Ebaugh's claim, for an aggregate sum of $2,000 on behalf of all three plaintiffs. That is request to admit and response number four.

In addition, in furtherance of that settlement agreement, counsel to all the parties endorsed and caused to be entered by this Court an order dismissing plaintiff's claim against Teledyne with prejudice—request to admit number six and the plaintiff's response admitting that request.

So, thereafter, in fact, the agreed settlement amount was distributed, transmitted by Teledyne to the plaintiff's attorneys—request to admit number seven and the response admitting that.

Confirmation of that settlement agreement and entry of the order dismissing the plaintiff's claims against Teledyne with prejudice barred the plaintiff, including Mr. Ebaugh, from asserting any further claim against Teledyne for injury sustained in the aircraft accident which is the subject of this suit. That is request to admit number eight and plaintiff's response admitting that request.

The only other fact that needs to be stated is that, as indicated in the request to admit number 9, Teledyne, the settling defendant, was alleged in the prior action before Your Honor to be a joint tort-feasor with Cessna—request number nine and admitted by plaintiff's response.

It is further, we feel, from the proof submitted to Your Honor, quite clear that no written covenant not to sue was executed by and tendered by or on behalf of Mr. Ebaugh to Teledyne, the settling defendant, in connection with this case. I would, obviously, advert to the fact that that request was not admitted but, rather, denied by plaintiff, by saying that this Court's order, in fact, represented a covenant not to sue.

There are really no other facts which, it seems to me, are pertinent to the argument or to the decision on this Motion for Summary Judgment. The plaintiff's opposition, written opposition, to our Motion for Summary Judgment says there are fact issues, but at no point does it specify what those fact issues are, nor does it advert in the opposition to even one with respect to the facts that I just stated and which are, for the purposes of this motion and this case, deemed under the rule to be admitted by the Requests for Admissions.

The basis for the motion, as Your Honor is aware, is our contention, supported in the Memorandum, that the release of joint tort-feasor, releasing all, the rule of the common law in Virginia operated with respect to this case, because of the time it occurred; and that, absent the application of the then-existing provision of law with respect to covenant, written covenant, not to sue, the plaintiff is barred from pursuing this defendant, and the summary judgement should be granted, therefore, in its favor.

The plaintiff, in its brief, in his opposition, does not disagree that that is the law, nor that the series of cases, beginning with Your Honor's decision in *Carickhoff* and *Shiflet*, and culminating in what is essentially an affirmance of the principle in *Carickhoff* by the Virginia Supreme Court in the *Potomac Hospital* case, in fact, is not the law. They make no contention that that law does not apply to them. In fact, their brief filed in this court notes, in furtherance of that acceptance of the principle, that they could not, in fact, execute a release, a written

release. It is their belief that they could not execute a release because the statute was not then effective, so that it would not have barred this cause of action.

So, they don't argue with the proposition of law that supports our motion, but they say that the order of this Court represented a written covenant not to sue under the existing conditions of 8.01-35.1. We believe and have argued in our Memorandum, and I am certainly not going to argue that, restate all of the propositions therein, and will ask that my argument in the Memorandum be incorporated in this, but we believe it's clearly not a convenant not to sue when an order is executed by a court, dismissing a cause of action with prejudice.

The order itself has no terms which refer to a convenant not to sue. The order itself is not executed by the plaintiff, and, indeed, the formality of execution by counsel is utterly unimportant to the validity or the substance of the order, which is, of course, Your Honor's order, and not the order or a provision of counsel.

Secondly, it seems to us that the argument with respect to the order of this Court representing a convenant not to sue within the meaning of 8.01-35.1 is belied by the specific language of 8.01-35.1, specifically, the reference to covenant not to sue given, *i.e.*, adopted, specifically Subsection (d). Though it was itself, in terms of impact, obviously determined to be unconstitutional, the language in there is pertinent to the statutory intent and the intent of the legislature that it be adopted.

And furthermore, we believe the decision of the Supreme Court in the *Hayman* case, which we cite in our Memorandum, rather clearly suggests that an instrument within the meaning of 8.01-35.1 is, in fact, required to be a written document.

Alternatively, the plaintiffs, in their briefs before Your Honor, suggest essentially that, indeed, though they did settle with someone, and that they are barred from pursuing that someone, *i.e.*, Teledyne, for a cause of action which represents an indivisible injury arising out of this

aviation accident, that the someone with whom they settled is not a tort-feasor within the meaning of the common-law rule, and they say that on the basis of what we submit are nothing other than conclusions or opinions of counsel, which have no place in this Court's consideration of a Motion for Summary Judgment, and secondly, are belied not only by written pleadings filed before Your Honor in the previous cause of action denominating Teledyne, Continental Motors, as a tort-feasor and, therefore, with an indivisible cause of action, a joint tort-feasor with this Cessna, but also the language which both parties cite, that is, the *Shortt v. Hudson* case, which is a case I know Your Honor is familiar with, decided by the Virginia Supreme Court, the text of the opinion appearing at Page 306, at 191 Va., and I quote—and this, by the way, Your Honor, is the case you may recall where the railroad had settled and a third party, another tort-feasor, was in a similar situation to ours here. "The record does not disclose the nature of the plaintiff's claim against the railway company. It does show that the present suit and the settlement which he made with that company arose out of the same collision. Having settled with the railway company, he is estopped to deny that he has no claim against it."

So, we believe that, similarly, the plaintiff in this case cannot now claim that he had no claim against the settling defendant, Teledyne Continental Motors. Indeed, the injury being indivisible, the Supreme Court went on to say, "Moreover, since the plaintiff had but a single claim, an indivisible cause of action for damages for his personal injuries arising out of the collision, in determining whether he has received satisfaction therefor and has released one of those responsible for the damage, it is immaterial whether those guilty of the wrongdoing were, strictly speaking, joint tort-feasors."

It is thus, we believe, under Virginia law, the indivisibility of the injury and the allegation of joint responsibility for that injury which properly denominates the

term of joint tort-feasor, rather than the conclusory assertion at some later point in time by counsel for the plaintiff that they did not regard themselves as having much of a claim or any claim against Teledyne.

It seems to me that that contention is further belied by the Requests for Admissions, where they admit they alleged Teledyne was a joint tort-feasor and have, indeed, settled with them, received funds, accepted those funds, and discharged them such that they are barred from further proceeding against Teledyne Continental Motors.

The third argument plaintiffs make is that, since there is no written release of Teledyne, that, therefore, there is no release of a joint tort-feasor. For that to be the case, Your Honor, it's quite obvious that they would have to be contending that there has been no release of Teledyne; that, in fact, the payment was simply something they took; that Teledyne and its able counsel, Mr. Hodges, really didn't get out of this, the prior case, in a manner which bars them.

It would be quite inconsistent with the Requests for Admission or responses where they concede that this settlement barred them from further proceeding against Teledyne Continental Motors. As we point out in our brief, there is no requirement of a written instrument to effect a release, provided a settling defendant pays consideration which is accepted by the plaintiff in satisfaction of their claim—not whatever their claim is everywhere, but the claim against that tort-feasor and effects an accord and satisfaction of that claim.

Indeed, as our brief notes, the presence or absence of a written instrument other than, of course, if there were to have been one—it was not a covenant not to sue in this case, which it is not—the presence or absence of a written instrument will not prevent the effect that the law in Virginia gives to both the receipt of payment and the dismissal of the claim, and acknowledgement and satisfaction thereof.

It is pointed out in a number of decisions, but one of the best examples is a quotation from *Wright v. Orlowski*, 218 Va. 115, at Page 120. I quote: "The making of an accord and the acceptance of a satisfaction will effect a release. When a tort-feasor accepts satisfaction from one tort-feasor"—and this is emphasized in the opinion— "for the part he played in the joint tort, that tort-feasor is released, and his release operates to release all other tort-feasors. This is a rule of law the operation of which the tort-feasee cannot defeat by a unilateral reservation of rights."

So, we believe it is quite clear in Virginia, and as cited in the other cases that stand for the proposition, that the release of a tort-feasor need not be effected by a written instrument in order to operate as a release.

One more point the plaintiffs seem to be endeavoring to make is that, and they use the terms "a full accord and satisfaction" as if to suggest that if they have not, in their minds, fully resolved an injury claim, *i.e.*, received what they regard as full compensation for all those injuries, then an accord and satisfaction, admittedly done with a tort-feasor, somehow doesn't operate to release other joint tort-feasors.

Subsumed in that is the notion, of course, that if the consideration for the release is by them now deemed to be small in consequence to the injuries, that somehow that means the release from the accord and satisfaction of the tort-feasor is not operative. We cited to the Court cases which we believe rather clearly show that an inquiry into the adequacy of consideration for a release, *i.e.*, looking as to whether Teledyne were released, as to whether or not the consideration was adequate, is not appropriate where it is admitted and understood that it was received in satisfaction of a claim against Teledyne. It does not have to have been received in satisfaction of the claim against all tort-feasors in order to operate as (1) a bar from the plaintiff proceeding against Teledyne

and of needs by reason of the common law rule, therefore a bar against proceeding against other tort-feasors.

The plaintiffs cite two cases in their Memorandum for this proposition—*Katzenberger*, which is a case which involved the release of a contract claim on a real-estate purchase and the holding in the case that that release did not bar a tort claim upon different grounds against an allegedly negligent attorney, different claims, and the *Williams* case, which is the case, as I know Your Honor knows, which involved the divisible-injury doctrine with respect to a subsequent malpractice act committed by an allegedly negligent physician.

It would not appear that either of those cases stand for the proposition that there can be something that is called an accord and satisfaction and a full accord and satisfaction as to the same tort-feasor. The Requests for Admission establish that Teledyne has been, indeed, released and plaintiffs' pursuing against them is barred by their own Requests for Admission.

It is clear that they do not have the protection which would be afforded by 8.01-35.1, as it then existed, by the execution of a written covenant not to sue.

It is further clear that they have released, in fact, this defendant, and for those reasons, I would ask Your Honor to grant the Motion for Summary Judgment, and would like to reserve a few moments of my time for rebuttal, in response to what the plaintiff's argument is.

Thank you, sir.

THE COURT: All right, sir.

Mr. Hall, is it?

MR. FUDALA: Your Honor, my name is David J. Fudala, with Mr. Hall's firm. I will stand in for him. Also with me is Mr. Landau with our firm.

THE COURT: Glad to have you.

MR. FUDALA: Your Honor, I think it's instructive to just give a little bit of background about how this situation arose.

This action against Cessna and Teledyne and other defendants was commenced originally by counsel for the workmen's compensation carrier for these plaintiffs, and a number of these defendants, including Teledyne, was added or initially in the lawsuit at that time. Then, later in the case, personal counsel entered in behalf of each of the plaintiffs, and Evan Ebaugh was represented by Mr. Hall of our firm.

At some point in time after discovery had been done in the case and a review of the National Traffic Safety Board reports and the reports of the testing of the engine of that plane, the claim against Teledyne was that the engine had somehow malfunctioned during pre-crash. As I understand it, the engine was taken from the crash site and it operated just fine upon testing.

Upon receipt of that information, Teledyne offered the amount of $2,000, the aggregate sum of $2,000, to all three plaintiffs, by way of deferring costs in the litigation, in return for a dismissal of their claims against them in that action.

Apparently, and this is contained in the Affidavits of Sue Evans, who was counsel in the firm for the workmen's comp carrier, who negotiated that transaction, two of the counsel—not Mr. Hall, I might add—two of the counsel were reluctant to execute a covenant not to sue, and I can't represent to the Court what their reasons were, but it was agreed among the parties and it was the intent of the parties that a dismissal of Teledyne, through the entry of a dismissal order, would effect the purpose of what they wanted to accomplish; that is, that $2,000 be paid to defer costs. It was the sum of $667 per plaintiff, it turned out, and the action would not be further prosecuted against Teledyne.

Now, there was no written release or a document entitled "Written Covenant Not to Sue" which was executed by the parties. There's no dispute about that.

There was a covenant not to sue executed by counsel by Teledyne, but two of the counsel for plaintiffs would not

sign it, so that it was agreed among the parties that that dismissal order would be sufficient. The intent was to not prosecute that action further against Teledyne.

Now, Mr. Appler suggested that there really is no fact in dispute in this case, but there really is, and what the Court has to look at, I think, is: What was the intent of the parties when they entered this transaction? And I believe the Supreme Court cases all support that analysis, that you can't just look at the document and read its language; you have to understand the intent of the parties.

The intent was to not prosecute further that claim, and I think it's significant—I think Your Honor's familiar—that, ordinarily, if you're going to release a party from a lawsuit with full accord and satisfaction, there is an order entered dismissing that party from the litigation; but there's also, ordinarily, another document which would purport to release any and all claims against that tort-feasor.

That wasn't done here, and that was purposeful. The idea and the intent of the parties was exactly the same intent that you would do in a covenant not to sue. I have a hard time understanding quite what, the difference between a covenant not to sue and a release, and I think, under the current state of law, we don't have to worry about that anymore, except for older cases.

But the essence of a covenant not to sue is the promise not to prosecute further, and the essence of a release is immediate discharge of any and all possible claims against a party. When you look at the order which was entered in this case, that can well be construed as a covenant not to sue, because all it does is dismiss the claims in that action against Teledyne—in other words, not to prosecute further that action against Teledyne.

Now, Mr. Appler suggests that a covenant not to sue, as we're using it here, must be in writing, it must be entitled "Covenant Not to Sue," and it must track the language of 8.01-35.1.

The statute doesn't say that. *Hayman v. Patio Products*, which he has cited, doesn't say that. *Hayman v. Patio Products* does say that the particular document in that case did track the statute, and, therefore, it was valid, but there's nothing in that case that says that a covenant not to sue must be a written document, number one, and, number two, must track explicitly the language of the statute. It simply doesn't say that, and he suggested it, and I understand why he does, but it doesn't say that, so that this Court is free to look at that dismissal order and construe it as a covenant not to sue.

And again, the point was that, at some point in time in the litigation, it was determined very clearly that there was no claim against Teledyne. Teledyne was not a tort-feasor. Counsel agreed on that, and I think it's significant that Your Honor would note, if you look at the order which was entered, it contains the signatures of all counsel of record, including Mr. Appler himself as counsel for Cessna.

I think it's significant that Cessna did not seek to keep Teledyne in that litigation and assert a cross-claim or a claim for indemnification and, in fact, agreed to the dismissal of that co-defendant by signing that order. I think that's significant for two reasons: I think it shows and supports that they agreed that there wasn't a claim against Teledyne as counsel for plaintiffs concluded, and therefore was not a tort-feasor; and (2) I think it estops Cessna at this point from coming forward and saying, "Oh, we signed the order and let them out, but all the while, we knew in the back of our minds that that was releasing us, too." I think that certainly estops Cessna from making that argument now, and if you look at the order, Your Honor, you will see that, in fact, Mr. Appler did sign it.

The import of our position is very clear—that defendant Teledyne was added as a party or brought in as a party at utmost caution in a situation against a large corporation like Cessna, where you're not sure where the fault lies in the accident. After some discovery is deter-

mined, it's clear that they're not. Now they are let out of the lawsuit for a minimal amount of money. There is not a release done for a specific reason, so that they will not release all claims against them, release the joint tort-feasor.

I think all the papers support that, and Your Honor can take that into consideration and conclude that the intent of the parties was to, in effect, execute a covenant not to sue through the use of this dismissal order, and I think that's exactly what happened here, and it would be extremely unjust under the circumstances to say that Cessna is out of the lawsuit, particularly since they signed that order.

I think I've addressed all of Mr. Appler's points. I think our argument is a very simple one, as set forth in our papers. You're not restricted to what the writing says; you can take into account the surrounding circumstances, the intent of the parties, and I think that intent is very clear here, as set forth in our papers and my argument.

THE COURT: Thank you, sir.

All right, Mr. Appler.

MR. APPLER: Just very briefly, Your Honor. I did not advert to the motion, but since counsel was referring to the Affidavit of counsel, I would just underline the point that I think Rule 56(e) requires, among other things, the showing that the Affidavit is made from personal knowledge, and this was not. By its own terms, they need to establish competency, and it does not, and as our motion indicates, it is essentially a conclusion, which I don't think can overcome the operative facts which are taken as admitted under the Requests for Admission.

Now, I can remember probably two-and-a-half or three years ago being before Your Honor in the previous case and hearing for the first time the argument that was just expressed here, that, well, we have really Ms. Evans or Miss Greenlief, who represent the workmen's comp car-

rier, and they're the ones who did this, they're really the ones who did this, and then we got the other attorneys in who represented the individuals.

I understand the reason why that argument's made, but I would point out that the firm of Siciliano, Ellis, Sheridan & Dyer was counsel of record to all of these plaintiffs throughout all of the proceedings, and the addition of additional counsel to each of these plaintiffs cannot change that fact.

Indeed, we don't have a case here by the Requests for Admission where the workmen's compensation carrier decided to settle their portion of the case, and if we did, we would not have a Motion for Summary Judgment.

These plaintiffs, and of importance to us, only today, this plaintiff, Ebaugh, agreed affirmatively to settle a case with Teledyne. He cannot now say he didn't make that agreement and ignore its legal effect under the law of Virginia.

The argument that Mr. Fudala made is that, since people usually use a release, and since it's conceded that no release was, no written release was executed, that must mean that it was intended to be a covenant not to sue. It does not fly under the words of the decision we cited to Your Honor. It's the effect of the agreement to accept the satisfaction from that defendant, which is demonstrated by the Requests for Admission and the response.

And finally, I think the argument that I, by endorsing a dismissal order entered by this Court in the previous matter, have not only agreed that there is no claim against Teledyne, or was never, and is now and never can be or could have been any claim against Teledyne Continental Motors by the plaintiffs, and furthermore, that that was somehow a covenant not to sue because it was signed by the plaintiff, and therefore I'm a party to it, or that I'm not surprised, doesn't really get to the issue of the statute and what appears to me to be a fairly obvious intent, that as of the version in effect at the time

this cause of action arose, a written covenant not to sue. I have never argued that it needs to be in precise terms that the statute says.

I do say it would appear from the decision and from the language of the statute itself, both the then version and as determined by subsequent adoptions, that it was, by the legislature, the General Assembly, intended to be in writing.

If Your Honor deems that there are facts with respect to the matter that have been legitimately raised, as opposed to conclusions or opinions, in the Affidavit, then I suppose discovery with respect to those facts, whatever they may be, could be taken and Your Honor rule at that time, but it does seem to me that where we started from is that the opposition suggests there are issues of fact and, indeed, adverts to none, and if it is a matter of law, then I believe Your Honor has an obligation to grant this motion at this time, based upon the state of the law, and ask you to do it at this time.

Thank you.

THE COURT: All right, gentlemen, sometime, about the time I reach the point at which I can take senior status, which is a number of years hence, it's possible that this Court won't be confronted anymore with interpretations of the changes wrought in the statutes, I think principally by the Honorable Bernard Cohen, by which you came into this odd situation of changing the old common-law doctrine in Virginia. In a prior incarnation, this Court was engaged in discussing those matters in 1978 and '79 and was bitterly opposed to the changes that were made, feeling that the bar generally, certainly the bench, was familiar with the old rule and it just worked fine.

The change came about primarily because of the case of *Wright v. Orlowski*, a difficult case, and one in which the court, Supreme Court of Appeals, or Supreme Court of Appeals of Virginia said that it did result on occasion in harsh results, but that it was known to all the bench and

bar, and that you had to live by it. Effective 1 July 1979, the comon-law rule was changed to permit the giving of a covenant not to sue to one joint tort-feasor in exchange for settlement with that tort-feasor, without releasing your claim against the other tort-feasors; and, bless Pat, just about the time this Court got on the bench, here comes a case where the document executed was executed in August of 1979, and it was a release, not a covenant not to sue, and this Court held that that was not, that that did not comport with the statute, and that the execution of the release, consequently, released the other joint tort-feasors. That went up to the Court of Appeals, and they affirmed it.

In 1980, effective 1 July 1980, as I recall the date, the statute was changed again, and this time it said the giving of a covenant not to sue or a release to a joint tort-feasor does not, by that fact, release the other joint tort-feasors. You've gone full circle, then. You've just done away with the old common-law rule.

In this case, the accident happened in July of 1979. At that time, it was after the 1st of July, and at that time the operative statute said that if you gave a covenant not to sue to the defendant with whom you were settling or with whom you had reached an accord and satisfaction, that reaching that accord and satisfaction under a covenant not to sue, in effect, preserved your rights to proceed against other joint tort-feasors.

In this instance, in order to determine the answer to the question raised by the Motion for Summary Judgment, the Court is required to go back to *Nichols against Augusta Aviation*, which is the case in which the accord and satisfaction with Teledyne was reached.

There is a rather close similarity between the fact pattern here and the fact pattern in *Orlowski*, not in terms of the conclusion that Teledyne had no liability, but in terms of how Teledyne was gotten out of the case.

There is a strong difference between what—let me withdraw that and go on.

It is apparent and admitted that, in *Nichols against Augusta Aviation*, Teledyne was named as a joint tort-feasor. That is conceded in the Requests for Admission. As a joint tort-feasor, it is further conceded that the parties reached their peace with Teledyne in exchange for a payment of some $2,000, and for reasons which this Court absolutely cannot fathom, according to Mr. Fudala's statement in argument, counsel for two of the parties refused to execute a covenant not to sue. It would have been so simple and so easy, but they didn't.

Instead, an order was presented to this Court, properly endorsed, on its face perfect, dismissing Teledyne, and the Court entered the order at the request of counsel.

Now, that order is essentially a standard order of dismissal, and this is an important point in the case. A dismissal order terminates the action. It extinguishes the cause of action. It is the end, *finis*. A covenant not to sue does not extinguish the action; the action remains just as alive and just as viable as it ever was, save only by the provision made by the grantor of the covenant that that grantor will not sue the defendant, but the cause of action is not extinguished. That is a significant, even a critical, difference in this case.

The reason for the difference is relatively easy to see. If you go to the extent of entering an order of dismissal, which terminates the cause of action, there is a period within which that termination may be challenged, a relatively short period, note an appeal and move to rescind, and so on, within the short period, move to modify. Once that period is over, the matter is ended. There is no further action that the party can take, either of the parties can take.

In a covenant not to sue, on the other hand, until the running of the statue of limitations, that covenant not to sue is open to challenge for fraud, for overreaching, for any one of any of the bases on which a contract can be challenged; and if it is successfully challenged, the action remains alive. That is not the case with the end of the

period in which a judgment order may be modified, changed, or appealed. That distinction, in this Court's opinion, is critical in this case.

This Court had the chore—and it was more than a chore—of analyzing the same basic issue as is brought forward here in the *Carickhoff* case, though there it turned on right of contribution, and in *Carickhoff*, the Court, this Court, held that the right arose at the time of the injury, the time of the event, the injury. As a matter of fact, this Court held that three times before finally it was appealed in *Carickhoff*, and while, as the Court recalls the timing, while *Carickhoff* was pending in the Court of Appeals for the Fourth Circuit, *Shiflet against Eller* came down from the Supreme Court of Virginia, in which the holding was essentially the same, that the right was a substantive right and could not be taken away by retroactive application of later passed legislation.

The Supreme Court of Virginia has now reinforced that argument with *Potomac Hospital against Dillon*, where, in effect, they say that the doctrine, as enunciated in *Carickhoff* and *Shiflet* is correct in the law of Virginia. There must come a time when there can be no more cases pending in the State system where the accident occurred before 1979, but this Court ventures no prediction on when that happy day will come.

Aside from that editorial comment, this Court is not able to find that a dismissal order is a covenant not to sue, nor can it construe a dismissal order as a covenant not to sue for the very simple reason that the two things are totally different animals.

Counsel before me might agree, as they see the matter, that it is midnight tonight, but the fact that they agree that it is now midnight does not necessarily mean that that is accurate. The Court cannot find that the dismissal order in this case can be construed to be a covenant not to sue. It most assuredly is an accord and satisfaction, as conceded in the Requests for Admission, which terminated the right of the plaintiff in this action to go for-

ward against Teledyne, and since no covenant not to sue was given, then the common law applies, and you have a situation in which the plaintiff has, in fact, released a joint tort-feasor by entry of an order, has reached an accord and satisfaction with a joint tort-feasor, as a result of which a dismissal order is entered, so that any rights against that particular joint tort-feasor are terminated.

Under those circumstances, the common law, as we traditionally knew it, says that the right to proceed against any other joint tort-feasor has been extinguished.

Now, the argument that the payment which was made was small in comparison to the asserted injury is not persuasive to this Court. Accord and satisfaction is the key. The amounts are amounts which are determined in the judgment of the parties reaching the accord and satisfaction, and normally are not inquired into by a Court, and this Court declines to do so.

For the reasons indicated, the Motion for Summary Judgement will be granted.

All right, let's recess until the next one.

NOTE: At this point, the hearing was concluded at 1:05 p.m.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-2331

EVAN EBAUGH,

Appellant,

v.

CESSNA AIRCRAFT COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Virginia

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[Filed Oct. 6, 1987]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1591 (L)

WILLIAM DOUGLAS AUER,
Appellant,

versus

KAWASAKI MOTORS CORP., U.S.A.,
Appellee,

and

KAWASAKI HEAVY INDUSTRIES, LTD., A Body Corporate of Kobe, Japan,
Defendant.

No. 85-2331

EVAN EBAUGH,
Appellant,

versus

CESSNA AIRCRAFT COMPANY,
Appellee.

No. 85-1864 (L)
No. 85-1865

FRANCIS MARION CAVE,
Appellee,

versus

JOHNS-MANVILLE, CORP., *et al*,
Defendants,

and

PITTSBURGH CORNING CORPORATION, *et al*,
Appellants.

[Filed Oct. 17, 1986]

For reasons appearing to the Court,

IT IS ORDERED that *Auer v. Kawaski*, No. 85-1591, and *Ebaugh v. Cessna*, No. 85-2331, are consolidated for the purpose of reargument before the in banc court. Reargument in banc is tentatively scheduled for the December term of Court.

IT IS FURTHER ORDERED that *Cave v. Johns-Manville*, No. 85-1864 and *Mann v. United States*, No. 85-1865, are hereby held in abeyance pending the outcome of the reargument in banc of *Auer v. Kawasaki* and *Ebaugh v. Cessna*.

Chief Judge Winter, Judge Russell, Judge Widener, Judge Hall, Judge Phillips, Judge Sprouse, Judge Ervin, Judge Chapman, Judge Wilkinson and Judge Wilkins voted in favor of rehearing in banc. There were no votes against rehearing in banc.

Entered at the direction of Judge Hall.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
United States Courthouse
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Re: 85-1591(L), 85-2331, William Douglas Auer vs. Kawasaki Motors Corp., U.S.A.

Dear Counsel:

These cases are currently scheduled for reargument in banc on December 8, 1986. I have been directed by the Court to inform counsel that a principal consideration for rehearing in these cases in banc is to decide the

following questions as to whether federal or state law governs the settlements at issue in these cases:

(a) Does the rule established in Gamewell Manufacturing, Inc. v. HVAC Supply, Inc., 715 F.2d 112, 115 (4 Cir. 1983), including the following language, apply to either or both of these cases:

> Settlements and releases assertedly entered into in respect of federal litigation already in progress implicate federal procedural interests distinct from the underlying substantive interests of the parties. Once a claim—whatever its jurisdictional basis—is initiated in the federal courts, we believe that the standards by which that litigation may be settled, and hence resolved short of adjudication on the merits, are pre-eminently a matter for resolution by federal common law principles independently derived.

(b) Are settlements of state and federal claims, which are the subject of ongoing federal litigation, controlled by the *Gamewell* principle?

The in banc court wishes counsel would be prepared to discuss these questions in argument, and the court will receive supplemental memoranda on the issue if any counsel desires to file one.

Sincerely yours,

JOHN M. GREACEN

By: /s/ Scott A. Richie
SCOTT A. RICHIE
Counsel for Clerk's Office

SAR:jm